No. 17070

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
an Oregon Corporation,

Appellant,

v.

HERSHEY CHOCOLATE CORPORATION,
a Delaware Corporation, et al.,

Appellees.

Upon Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

OPENING BRIEF OF APPELLANT ALBINA ENGINE & MACHINE WORKS, INC.

KRAUSE, LINDSAY & NAHSTOLL,
GUNTHER F. KRAUSE,
ALAN H. JOHANSEN,
916 Oregon Bank Building,
Portland 4, Oregon,
Proctors for Appellants, Albina Engine & Machine Works, Inc.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-61

SUBJECT INDEX

SUBJECT INDEX (Cont.)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

STATUTES AND RULES

tion; Waltham Bag & Paper Company, a corporation; Zellerbach Paper Company, a corporation; Northwest Grocery Company, a corporation; Peyton Bag Company, a corporation; W. E. Finzer & Company, a corporation; and Hearst Publishing Company, Inc. (Pejepscot Paper Division), a corporation, against the SS ROBERT LUCKENBACH and and Luckenbach Steamship Company, Inc.

(2) Awarding to said libelants damages, in amounts to be later determined, against respondent Albina Engine & Machine Works, Inc., for cargo damage arising out of a fire occurring aboard the SS ROBERT LUCKENBACH on April 2, 1958, while said vessel was berthed on the Willamette River at Portland, Oregon.

(3) Awarding Luckenbach Steamship Company, Inc., damages in an amount to be later determined on its cross-claim and amended cross-libel against Albina Engine & Machine Works, Inc.

(4) Dismissing Albina's cross-claims and cross-libel against Luckenbach.

Jurisdiction of the District Court

The District Court's admiralty and maritime jurisdiction rested on 28 U.S.C.A., § 1333(1) and was invoked by the libels of the respective libelants which set forth claims for damages based upon an alleged maritime tort by respondents Luckenbach and Albina (R. 5, 9; as to remaining libels, see explanatory note in "Designation of Record for Printing on Appeal," R. 629).

Luckenbach's cross-claim against Albina for indemnity

or contribution was based upon Albina's alleged negligence and alleged breach of contract for ship repairs (R. 17). Luckenbach's amended cross-claim and cross-libel against Albina for damages was likewise based upon Albina's alleged negligence and alleged breach of contract for ship repair (R. 40).

Albina's cross-libels for contribution or indemnity from Luckenbach were based upon alleged negligence of Luckenbach and unseaworthiness of the vessel (R. 29, 30; 36).

Albina's second cause of suit and cross-libel against Luckenbach was to recover monies allegedly due and owing under a contract for repair of the SS ROBERT LUCKENBACH (R. 37).

The District Court's admiralty and maritime jurisdiction over the respective parties' cross-claims and cross-libels rested on 28 U.S.C.A., § 1333(1).

Jurisdiction of the Court of Appeals

The District Court's decree, entered May 16, 1960, was an interlocutory decree in admiralty determining the rights and liabilities of the parties (R. 92-94). On May 27, 1960, appellant Albina filed a timely notice of appeal to this Court (R. 95) within the time permitted by 28 U.S.C.A., § 2107 for proceedings in admiralty.

This Court has jurisdiction of the appeal by virtue of 28 U.S.C.A., §§ 1292(3) and 1294(1).

STATEMENT OF THE CASE

These consolidated cases were commenced by the respective libelants to recover for damage to their respective lots of cargo, resulting from a fire aboard the SS ROBERT LUCKENBACH while the vessel was berthed at Portland, Oregon, on April 2, 1958. Libelants contended that the fire was caused by the negligence of both Luckenbach and Albina and by unseaworthiness of the vessel (R. 56-60).

Respondent Luckenbach contended that the fire was solely caused by the negligence of Albina, and accordingly sought indemnity or contribution from Albina on account of any sums Luckenbach might be required to pay the libelants. Luckenbach also sought to recover from Albina consequential damages allegedly sustained by Luckenbach as the result of the fire.

Albina, in turn, contended that the damage sustained by libelants and Luckenbach was solely caused by the negligence of Luckenbach and the unseaworthiness of the vessel, and accordingly sought indemnity or contribution from Luckenbach on account of any sums Albina might be required to pay the libelants. Albina also sought to recover from Luckenbach the amount of Albina's bill for repairing fire damage to the vessel.

The basic question involves the relative responsibility of Luckenbach and Albina for the fire and the resultant damages to the various parties. As to many of the facts there is no dispute between the parties. As to many additional facts, the evidence is clear and unconflicting. The principal questions to be resolved by this appeal depend

upon the proper inferences and conclusions to be drawn from the basic facts, to determine the relative responsibility of Albina and Luckenbach for the damages flowing from the fire.

Because of the complexity of the various questions raised, and to minimize the necessity for discussing strictly factual matters in subsequent portions of this brief, a fairly complete statement of the case is hereinafter made.

Agreed Facts

In the consolidated pretrial order, the parties, with the approval of the Court, agreed to the following statement of facts (R. 50-56):

> "Libelants, Hershey Chocolate Corporation, Longview Fibre Company, Waltham Bag and Paper Company, Zellerbach Paper Company, Northwest Grocery Company, Peyton Bag Company, W. E. Finzer & Company, and Hearst Publishing Company, Inc. (Pejepscot Paper Division), were and now are corporations and were the owners of certain goods, wares, and merchandise which had by them been delivered in apparent good order and condition to Luckenbach Steamship Company, Inc., a corporation (hereinafter referred to as 'Luckenbach'), for delivery to Portland, Oregon, in consideration of agreed freight and in accordance with the terms and conditions of certain bills of lading.
>
> II.
>
> "Said goods, wares and merchandises were loaded as cargo aboard the S.S. Robert Luckenbach, an ocean-going cargo vessel, registry No. 245923, owned and operated by Luckenbach, and while aboard said vessel in the city of Portland, Oregon, received damage by fire or water while said vessel was undergoing re-

pairs performed and to be performed at said city by Albina Engine & Machine Works, Inc., a corporation (hereinafter referred to as 'Albina').

III.

"While said vessel was undergoing said repairs, a fire broke out aboard the vessel, which together with the water used to extinguish the same, caused the damage and loss of said cargo. At said time and place a section of the main fire line aboard the vessel had been removed. The fire aboard said vessel started as a result of sparks from welding by acetylene torch which was performed by employees of Albina, who were performing the repairs within the scope of their employment.

IV.

"In the forenoon of April 2, 1958, the Chief Officer of the S.S. Robert Luckenbach reported to Luckenbach's port engineer, Mr. Sterling, that one of the lower rungs was missing from the iron ladder located in the after part of No. 5 hold, and Mr. Sterling engaged Albina to install a new rung. At that time the lower portion of the after ladder, No. 5 hold, was obscured by cargo consisting of metal conduit pipe stowed in the after part of No. 5 hold. The repair work to be done on the after ladder was a welding job and could not be done while longshoremen were working in the hold, as they were. Accordingly, it was mutually contemplated that the repair work would be performed some time between 6:00 and 7:00 p.m., the longshoremen's meal hour, by which time it was expected that discharge of the metal conduit pipe would have been completed.

"The longshoremen ceased work for their meal hour at 6:00 p.m., and some time thereafter, Albina's three-man welding crew entered No. 5 hold of the ship to do the welding job. Said crew consisted of Smith, a boilermaker foreman, who was in charge; Larson, a welder; and Riley, a welder who was to act as fitter on this particular job.

"The ladder in No. 5 hold requiring repair by replacement of a missing rung was not, in fact, the after ladder in that hold, as had been reported to Sterling, but in fact was the forward ladder in that hold. Sterling, having left the ship, did not know this. Between the time when Sterling gave the order to repair the after ladder and the time the welders entered the hold, the cargo had been removed from around this ladder, and sufficiently removed from around the forward ladder, to expose both, so that it was evident to the welders which ladder needed repair. Accordingly, without further instructions, they proceeded to work on the forward ladder. Forward of this ladder, and extending clear across the width of the ship, was cargo consisting of several tiers of bales of burlap bags on the bottom, and cardboard cartons of construction paper on top. The distance between this cargo and the forward ladder, as stated by various witnesses, was from two to four feet. Mr. Smith placed two plywood 'walk-boards,' end to end, up against the cargo to serve as a screen or partition between it and the ladder. On the port side of the ladder he stood a carton or box next to and up against the plywood partition and extending aft from it, substantially at a right angle. In addition, he laid a one-inch board, athwartships, against and along the bottom of the plywood partition.

"The place where the Albina men stood to perform the welding job on the forward ladder was clear of cargo. On the deck at this place was a 'landing pad' which was a wooden floor covering the deck at this place used for landing cargo being loaded in the hold, thus protecting the deck from damage. Around the outside of this landing pad was a ramp which sloped slightly to the deck, the slope of the forward edge of this ramp being toward the forward ladder.

"The missing ladder rung was the second or third one up from the bottom. A temporary rung was in position there and was removed by Smith. The place where the new rung was to be welded in was between 4 and 5 feet above the landing pad (according to Smith).

"In the No. 5 hold there was a can variously estimated to hold from three to five gallons containing drinking water for the longshoremen who had left it in the hold when they knocked off work. To what extent this can was filled with water is not agreed to by the parties. The welding crew brought no fire-fighting or fire extinguishing equipment of any kind on board the ship.

"Albina's welder, Larson, struck an arc and began to burn off a small gob of metal where the old rung had been. Immediately, a spark or sparks or a piece of burning metal flew over the top of the partition and/or fell onto the forward ramp of the landing pad or upon the deck itself, rolled or bounced under or through the plywood partition, setting fire to the burlap bags.

"Smith and his men pulled the plywood partition apart and tried to extinguish the fire with water from the above-mentioned can but were unsuccessful. Smith and Riley then came on deck to lower a ship's fire hose and to obtain water pressure; Larson remained in the hold for a time to handle the hose.

"Meanwhile, the city fire department had already been called. The city firemen extinguished the fire with water from their own hoses. According to the fire department's records, the call was received at 6:20 p.m. The time interval between the calling of the fire department and the arrival of the fire department personnel on the scene has been stated by various witnesses to have been from three or four minutes up to fifteen minutes. The firemen had water in No. 5 hold within four minutes after their arrival.

"The fire in No. 5 hold so heated the bulkhead between No. 5 and No. 4 holds that there was a danger of fire occurring in No. 4 hold also. Therefore, the fire department poured water into No. 4 hold, damaging cargo stowed there.

"Some of the ship's plates and the bulkhead between

No. 4 and No. 5 holds were buckled and damaged by the fire, and the ship sustained other damage therefrom, all of which Albina repaired at a stated cost of $28,933.89.

V.

"At all times there were in full force and effect the following regulations:

Coast Guard, Department of the Treasury, Part 126, 'Handling of Explosives or other Dangerous Cargoes within or Contiguous to Waterfront Facilities';

Code of Federal Regulations, Title 33, Section 126.15, Volume 22, Federal Registry No. 246, published December 20, 1957;

Code of Federal Regulations, Title 46, Part 146 to 149, revised as of January 1, 1958, Section 146.27-100, pages 582 and 602;

City Ordinance of the City of Portland, Section 16-2527, passed by the City Council of the City of Portland;

Code of Federal Regulations, Title 46, Section 142.02-20."

The foregoing constitutes the agreed statement of facts from the Consolidated Pretrial Order. However, it is pertinent to here note that the parties also stipulated, in the Consolidated Pretrial Order, that testimony given before the U.S. Coast Guard Investigating Unit might, subject to objection as to materiality, relevancy and competency, be offered by any party and received into evidence, and that the foregoing agreed statement of facts might be supplemented by additional testimony on behalf of any party (R. 56).

Additional Facts Established by the Evidence

Albina called seven witnesses who testified at the trial. Otherwise, the evidence consists entirely of various exhibits, including the complete transcript of testimony before the U.S. Coast Guard Investigating Unit. References herein to testimony before the Coast Guard, as well as references to trial testimony, are to the pages of the printed record herein where such testimony appears.

Herbert W. Sterling, Luckenbach's port engineer, testified that pursuant to a verbal request from the chief engineer to him, and from him to Albina, Albina removed a section of the ship's fire line, which was defective, in order that the defective section might be replaced. Sterling directed Albina to remove the defective pipe and to furnish two blank flanges and install them on the fire lines (R. 315, 318). Sterling's request to Albina's representative, Bailey, with respect to renewal of the section of fire main was pursuant to a verbal order (R. 318).

Sterling inquired of the vessel's chief engineer if he could "handle the situation" of attaching to the fire line a hose for the purpose of furnishing water from a dockside hydrant to maintain fire protection while the section of fire line was removed from the vessel. The chief engineer indicated that he would take care of this problem, and relied upon the first assistant engineer to make the connection (R. 321, 322, 438). Sterling testified that there was a hose available right beside the fire line, and that all the engineer had to do was to move it five feet. When the fire started the chief engineer or the first assistant engineer was using the dock water hydrant and hose to

fill the ship's forepeak tank with fresh water and he could have connected that hose to the fire line. Sterling also testified that the engineer could have supplied water to the fire system by connecting a hose from the No. 6 plug on the bridge deck to the fire line. According to Sterling, the removal of the section of fire main did not totally cut off the fire line, water still being available to a 2½-inch fire plug in the port saloon deck alleyway (R. 321, 322, 438, 439).

Indeed, it appeared that even after the removal of a section of fire line, a vertical riser from the engine room fire pump would still supply water pressure to three stations on the port side, one on the saloon deck, one on the passenger berth deck, and one on the bridge deck (R. 323).

The chief engineer told Sterling that he would take care of supplying water to the fire system. Sterling had no plans that the contractor, Albina, was to attend to this, and no separate order, as would have been required, was given to Albina to conduct dock water to the fire line (R. 323, 324).

The replacement of a ladder rung in No. 5 hold (see agreed facts, R. 52, 53), like the repair of the fire line, was authorized by a verbal order from Sterling to Albina's personnel (R. 316-318, 485-490), in accordance with the established custom or practice between these parties, whereby Albina would perform repair work on Luckenbach's ships on the strength of oral authorization from Sterling, which was ordinarily later confirmed by written order (R. 586-588).

Radovich, Luckenbach's Marine Superintendent, learned well in advance of the arrival of the welding crew that it was the forward rather than the after ladder in No. 5 hold which needed repair, and Radovich telephoned to Richard Brewer, Albina's ship repair superintendent, advising that it was the forward ladder instead of the after ladder and directing that the repairs should be made between 6:00 and 7:00 p.m. that evening (R. 502, 503). Radovich's duties and specific functions included the direction and observation of loading and discharging cargo (R. 214, 215). He was responsible for coordinating the discharge of cargo with repair work to be done aboard the vessel (R. 216).

Radovich made arrangements for removal of cargo aboard Luckenbach vessels when Albina had to go into the holds for repair work (R. 495, 499). Albina looked to Radovich to fix the time when repairs could be made, and Radovich determined when the space would be available for such purposes (R. 504).

There was cargo in the forward end of No. 5 hatch when the welding crew arrived to repair the ladder. However, the foot of the ladder, an area from two to four feet forward of the ladder and to port and starboard of the ladder, was clear of cargo (R. 53).

The fire, once it started, could have been extinguished by the welding crew with a minimal amount of damage had water been available in the ship's fire line. Larson, the welder who stayed in the hold for a time to handle the fire hose (R. 574), testified that he stayed in the hold for approximately six minutes waiting for water to come

through the hose (R. 574). He could see how big the fire was before he came up out of the hold, could see where it was burning, and could have extinguished the fire if he had gotten water through the hose (R. 576). Up to the time he left the hold, the fire was confined to bales of burlap, in an area about the size of the clerk's desk (R. 576) which was later measured, pursuant to stipulation of the parties, and found to be eight feet long, 39 inches wide and 40 inches high (R. 585). There was no fire in any of the paper cargo at that time, and the fire had not gotten hot enough to do any damage to the steel of the vessel (R. 576). Larson estimated that it was "ten minutes, anyway" from the time the fire started until the first water was poured onto the fire by the fire department (R. 577).

Riley, the member of the welding crew who came up onto the deck and lowered the fire hose down into the hatch, estimated that it was two minutes from the time he first saw smoke in the burlap to the time when he lowered the hose down into the hatch (R. 555).

Smith, the welding crew foreman, who helped Riley get the fire hose out of the rack and who then went to the engine room to ask them to start the fire pumps (R. 525), also indicated that two minutes elapsed after the start of the fire until they had the hose down to Larson (R. 528). Assistant Chief Post of the Portland Fire Department and Battalion Chief Roth both indicated that they received a "delayed alarm" with respect to the fire, in that they were not called the minute the fire started, and that if water had been applied to the fire promptly

the damage would have been minimized (R. 407, 408, 428).

The Chief Engineer aboard the vessel, Mr. Hebert, testified at the Coast Guard hearing to the effect that he "was under the impression" that after Albina blanked off the fire line they would connect the shore line to the system (R. 280). However, the testimony of numerous other witnesses not only makes it clear that there was no basis for assuming that Albina would make such alternate connection, but that Hebert in fact made no such assumption.

Sterling, Luckenbach's Port Engineer, testified that the Chief Engineer, Mr. Hebert, said he would take care of having water in the fire lines and that there was no order or understanding that Albina was to do so (R. 321-323). Richard Bailey, one of Albina's repair Superintendents, testified that "Upon taking this section of line out, the Chief Engineer made arrangements for us to blank both sides of the line that *he* could have a solid main in the engine room and a solid main on deck and hook water up from the dock—or was to hook water up from the dock to this fire main so that *he* would have dock water on the fire main and ship water on the engine room." (R. 187, emphasis supplied).

Albina's other Superintendent, Richard Brewer, testified to being present during a conversation between Sterling and the Chief Engineer as to various repairs to be made, during which Sterling asked Hebert how the latter could maintain fire protection on the vessel, to which Hebert replied to the effect that he would have Albina's

pipefitters install blanks on the line so that he, Hebert, could maintain fire protection on the vessel (R. 487-489).

This conversation is corroborated by the testimony of the ship's First Assistant Engineer, Mr. Beutgen, who indicated that the Chief Engineer expected him, Beutgen, to actually make the connection to the fire line, but that he did not do so (R. 437-439). Beutgen said that the section of fire line was taken out at about 3:00 p.m. (R. 434), but that he did not then make the connection from the shore hydrant to the fire main system because he knew he was going to be right there just outside of a few minutes. He was apparently attempting to fill the ship's fresh water tanks, and expected to be finished with that by 6:00 p.m. but was not (R. 438, 439).

Mr. Beutgen, it appears, left the ship about 6:15 p.m. to walk up to the corner for a newspaper, and returned at about 6:40. Meanwhile, the fire had started and the fire department had arrived (R. 431, 432). It appears that the inoperative status of the fire main system had not been reported to any of the ship's crew outside of the engineering department (R. 285; 444). Indeed, Mr. Porter, the Second Assistant Engineer, testified that he was not advised of the removal of the section of the fire main until after the fire (R. 455). Also, Mr. Elixson, Junior Third Assistant Engineer, who was engineering watch officer on duty from four to midnight on April 2 (R. 298), the period during which the fire started, testified that he had not been informed and was not aware of any repairs being made to the fire main system (R. 298).

Thus, it appears that only two members of the ship's

crew were aware that a section of the fire main had been removed, the Chief Engineer, Mr. Hebert, and the First Assistant Engineer, Mr. Beutgen. Mr. Hebert had gone ashore at about 5:20 or 5:30 p.m. (R. 277). Mr. Beutgen, as indicated above, had gone ashore at about 6:15, before the fire started, and returned at 6:40 at which time the fire department had arrived (R. 432).

With respect to the fire damage repairs to the ship, it is admitted that Albina made such repairs at a stated cost of $28,933.89 (R. 55) and that payment has not been made therefor, although payment has been demanded (R. 42).

The uncontradicted testimony of Mr. John Sutherland, Assistant Secretary of Albina, established that these repairs were accomplished on the verbal authorization of Luckenbach's Port Engineer, Herbert Sterling, in accordance with the normal course of dealings between Luckenbach and Albina. It appears that Sterling instructed Albina to get along with the repairs, and that a written order would be forthcoming in the normal manner, but that Sterling later informed Sutherland, after the work had been done, that Luckenbach's New York office had advised not to issue a written order (R. 587-590).

Luckenbach's contention (Contention V, Consolidated Pretrial Order, R. 65) that Albina repaired the fire damage to the ship voluntarily, without any order to do so, and that its conduct in that regard constituted an admission of liability, was wholly refuted by the cross-examination of Mr. Sutherland by counsel for Luckenbach (R. 592, 593). There was no other evidence touching upon this subject.

Holding of the District Court

On the basis of the foregoing facts, the District Court held, among other things, that there was no obligation that Luckenbach would have its fire line in readiness and available during welding (Finding XVII, R. 91), that the fire was not caused by Luckenbach's design or neglect within the meaning of the fire statute and that Luckenbach was not liable to the libelants for the cargo damage or otherwise (Conclusions I, II, R. 91), and that the fire was caused solely by the fault of Albina (Finding XIII, R. 89). The Court further concluded that even if Luckenbach were liable to cargo, it would have a right of indemnity from Albina (Conclusion III, R. 91), and that Luckenbach was entitled to recover from Albina all its loss, damage and expense caused by the fire (Conclusion V, R. 91). The Court further concluded that Albina was not entitled to contribution or indemnity from Luckenbach (Conclusion V, R. 91), and that Albina was not entitled to collect its bill for repairing the fire damage to the ship (Conclusion VI, R. 92).

The Court adopted Luckenbach's Proposed Findings and Conclusions almost verbatim, including the adoption of the Court's Opinion as Findings and Conclusions (Finding II, R. 87) and entered its Interlocutory Decree accordingly (R 93, 94).

QUESTIONS ON APPEAL

The questions presented on this appeal by Appellant's Specifications of Error may be stated as follows:

I. Was it erroneous for the Court to adopt its Opinion as Findings of Fact and Conclusions of Law?

II. Should Luckenbach have been held liable directly to libelants for cargo damage? This ultimate question depends upon the five subsidiary issues raised under question III infra, and also upon the issue whether Luckenbach was insulated from direct liability to libelants by virtue of 46 U.S.C.A., § 182, the Fire Statute.

III. Was Albina's negligence the sole proximate cause of the damage sustained by libelants and by Luckenbach? This ultimate question depends upon resolution of the five following subsidiary issues:

(a) Was Luckenbach negligent in failing to remove flammable cargo from a hold where it ordered welding to be done?

(b) Was Luckenbach negligent in failing to provide an alternate source of water to the vessel's fire line, after the removal of a section of the fire main for repair?

(c) Was Luckenbach negligent in failing to man the vessel with competent personnel who were aware that a section of the fire main had been removed and who knew how to remedy the situation?

(d) Was Luckenbach guilty of negligence in violating applicable Coast Guard regulations?

(e) Was any unseaworthiness of the vessel, caused by the owner's lack of due diligence, a contributing cause of the damage to cargo or the vessel?

IV. Was Albina liable to indemnify Luckenbach on the basis of a breach of warranty of workmanlike service? This ultimate question depends upon resolution of the following subsidiary issues:

(a) As to damage to the ship and other loss allegedly sustained by Luckenbach, was any fault or breach by Albina a cause of such damage?

(b) As to the cargo damage, can Albina be held liable to indemnify Luckenbach without Luckenbach being liable to libelants in the first instance?

(c) As to the cargo damage, can Albina be held liable to indemnify Luckenbach (assuming Luckenbach was liable to cargo in the first instance) for such part of the loss as would not have occurred but for Luckenbach's neglect?

(d) Was Luckenbach's failure to remove flammable cargo from an area where it ordered welding to be performed, and/or its failure to supply water on the fire line, and/or its failure to man the vessel with competent personnel who were aware that the fire line was inoperative, such conduct on its part as would in any event preclude it from reliance upon an implied warranty of workmanlike service by Albina?

(e) Was Luckenbach precluded from relying on any breach of implied warranty by Albina, by rea-

son of Luckenbach's breach of an implied warranty of seaworthiness and of its express undertaking to supply water on the fire line?

V. Is Albina entitled to recover the amount of its bill for repair of fire damage to the ship from Luckenbach?

SPECIFICATIONS OF ERROR

I.

Finding of Fact No. II (R. 87) is erroneous in adopting the Court's Opinion as findings of fact and conclusions of law, in that the Court's said Opinion does not separately state findings of fact and conclusions of law and for the further reason that said Opinion is unsupported by and contrary to the clear weight of the evidence and is otherwise erroneous in law.

II.

The Court's Opinion, adopted as findings of fact and conclusions of law, is erroneous in making the following findings, conclusions, statements or holdings:

1. The Court erred in finding that "the can contained little water" (R. 76), in that such finding is not supported by any substantial evidence and is contrary to the clear weight of the evidence.

2. The Court erred in finding or concluding that Sterling did not know of the failure to connect the city fire hydrant to the ship, nor that any welding was to be done on the forward ladder in No. 5 hold (R. 77), in that such finding or conclusion is unsupported by any sub-

stantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

3. The Court erred in finding, concluding or stating that Albina's "use of an acetylene torch * * * under these conditions, was nothing less than wanton conduct. No doubt, it created a situation where the rule of absolute liability should apply" (R. 77, 78), in that such finding, conclusion or statement is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

4. The Court erred in finding or concluding that Albina was negligent by reason of violation of Code of Federal Regulations, Title 46, § 142.02-20 (R. 78, 79), in that said regulation is, as a matter of law, not applicable to a party in the position of Albina under the facts and circumstances in this case.

5. The Court erred in finding or concluding that said regulation applies to Albina (R. 79) in that said finding or conclusion is erroneous in law.

6. The Court erred in finding or concluding that § 16-2527 of the Police Code of the City of Portland is not in conflict with Federal statutes and regulations (R. 79), and such finding or conclusion is erroneous in law.

7. The Court erred in finding or concluding (R. 79) that Albina was negligent and caused the fire under specifications Nos. 1, 2, 4, 5, 6, 7 and 8 (of the Consolidated Pretrial Order) in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

8. The Court erred in finding, concluding or stating that Sterling ordered repairs to be made to the after ladder while the repairs were undertaken at the forward ladder (R. 79, 80), in that such finding, conclusion or statement is wholly immaterial to the issues in the case.

9. The Court erred in finding or concluding that Albina "without further instructions" made repairs at a place other than that where ordered (R. 80), in that such finding or conclusion is not supported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

10. The Court erred in finding or concluding that at 6:10 p.m., Radovich did not know that repairs were being made on a ladder other than pursuant to the original instructions (R. 81), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

11. The Court erred in finding or concluding that Radovich was a subordinate and that his duties were very limited (R. 81), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

12. The Court erred in finding or concluding that Radovich had nothing whatsoever to do with the repair of the ship (R. 81), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

13. The Court erred in finding or concluding that the burden is on the libelant to prove that the neglect of the owner caused the fire (R. 82), in that such finding or conclusion is erroneous in law.

14. The Court erred in attempting to distinguish *American Mail Line, Ltd. vs. Tokyo Marine & Fire Insurance Co., Ltd.,* 9th Cir., 1959, 270 F. 2d 499, upon the basis that in the instant case there is no evidence that anyone failed to use reasonable diligence after the start of the fire (R. 83, 84), in that such distinction is of no legal import, and is immaterial under the clear weight of the evidence in this case.

15. The Court erred in finding or concluding that the fire statute is applicable (R. 84), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

16. The Court erred in finding or concluding that Luckenbach and its superior officers were guilty of no negligence which caused the fire (R. 84), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

17. The Court erred in finding or concluding that no superior officer for Luckenbach had anything to do with welding on the forward ladder (R. 84), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

18. The Court erred in finding or concluding that Radovich had nothing to do with the repair of the ship or with removal of cargo from around the ladder (R. 84), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

19. The Court erred in finding or concluding that Albina is liable to Luckenbach, on the basis of a breach of warranty of workmanlike service (R. 85, 86), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

20. The Court erred in finding or concluding that Luckenbach is entitled to a decree against Albina for damage to the vessel (R. 86), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

21. The Court erred in finding or concluding that Albina is not entitled to a decree against Luckenbach for the repairs to the vessel other than repairs independent of the fire (R. 86), in that such finding or conclusion is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

III.

Finding of Fact No. III (R. 87), that the fire was not caused by the design or neglect of Luckenbach, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

IV.

Finding of Fact No. IV (R. 87), that the fire was caused by the gross negligence of Albina, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

V.

Finding of Fact No. VI (R. 88), insofar as it finds that Radovich was a mere subordinate employee of Luckenbach and not a managerial officer, that his functions were confined to Luckenbach's dock in Portland, that he reported to his superiors in the Portland uptown office, and that he had nothing to do with repairs, is unsupported by any evidence whatever.

VI.

Finding of Fact No. VII (R. 88), insofar as it finds that Sterling did not know that the welding was to be on the forward ladder and that if the welding had been done aft there would have been no fire, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

VII.

Finding of Fact No. X (R. 89), that Radovich had nothing to do with the repairs to the ladders and no knowledge with respect to removal of a section of the fire line, or the arrangements to supply substitute water from the dock hydrant, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

VIII.

Finding of Fact No. XI (R. 89), insofar as it finds

that Radovich did not know the welders would be aboard until he saw the sparks, is unsupported by any evidence whatever, and the remainder of said finding is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

IX.

Finding of Fact No. XII (R. 89), that neither Sterling nor Radovich were privy to the cause or progress of the fire, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

X.

Finding of Fact No. XIII (R. 89, 90), insofar as it finds that the fire was caused solely by the gross negligence of Albina, that the welding could have been safely done if proper and usual precautions were taken, that if any of the suggested precautions were taken there would have been no fire, that no precaution was taken, and that the only thing relied on was a can of longshoreman's drinking water which was utterly inadequate, is self-contradictory, is speculative, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence and is otherwise erroneous in law.

XI.

Finding of Fact No. XVI (R. 90), that Albina made no objection to Luckenbach with respect to conditions in the hold, is erroneous in that it is immaterial, irrelevant, ignores other facts, and ignores Luckenbach's duty to be aware of conditions in the hold.

XII.

Finding of Fact No. XVII (R. 91), that there was no contractual or other obligation by Luckenbach with respect to the readiness and availability of the fire line and that Albina in no way relied on it when it undertook the job, is unsupported by any substantial evidence, is contrary to the clear weight of the evidence, and is otherwise erroneous in law.

XIII.

Conclusions of Law Nos. I through VI, inclusive (R. 91, 92), are contrary to law, unsupported by any substantial evidence, and contrary to the clear weight of the evidence.

XIV.

The Court erred in holding that the sole cause of damage was negligence by Albina.

XV.

The Court erred in refusing to hold that Luckenbach's negligence and/or the unseaworthiness of the vessel constituted the sole or a contributing cause of the fire.

XVI.

The Court erred in refusing to hold that Luckenbach's negligence and/or the unseaworthiness of the vessel constituted the sole cause of the spread of the fire beyond the burlap and construction paper stowed forward of the forward ladder in No. 5 hold.

XVII.

The Court erred in refusing to hold that Luckenbach's negligence and/or the unseaworthiness of the vessel constituted the sole proximate cause of all fire damage to the vessel.

XVIII.

The Court erred in refusing to hold that libelants had a right of recovery against Luckenbach.

XIX.

Based upon the foregoing points, Appellant Albina contends that the Decree of the District Court was erroneous in awarding full recovery to the libelants against Albina, and in awarding any recovery to cross-claimant Luckenbach against Albina, and in denying Albina recovery against Luckenbach on its cross-libels, and further contends that a decree should have been entered against Luckenbach, and in any event that the decree entered should have dismissed Luckenbach's cross-claims against Albina and should have allowed recovery against Luckenbach on Albina's cross-libels.

SUMMARY OF ARGUMENT

I.

The District Court erred in adopting its Opinion as findings of fact and conclusions of law, in that such procedure was contrary to Admiralty Rules, Rule 46-1/2, to Federal Rules of Civil Procedure, Rule 52(a), and was prejudicial to a clear presentation of the issues involved in this appeal.

II.

The District Court erred in holding that Luckenbach is not liable directly to libelants, in that the neglect of the owner, within the meaning of the Fire Statute, 46 U.S.C.A., § 182, was a contributing cause of the start of the fire, and the sole proximate cause of most of the damage.

III.

The District Court erred in holding that negligence by Albina was the sole proximate cause of damage sustained by libelants and by Luckenbach in that Luckenbach was guilty of causally-related fault in various particulars:

A. In failing to remove flammable cargo from an area where it had ordered welding to be performed;

B. In failing to supply water on the ship's fire line;

C. In failing to keep the vessel manned with a competent crew;

D. In violating Coast Guard regulations applicable to Luckenbach.

E. In failing to exercise due diligence to provide a seaworthy vessel.

IV.

The District Court erred in holding Albina liable to indemnify Luckenbach on the basis of a breach of implied warranty of workmanlike service in that:

A. No fault or breach by Albina caused any damage to the vessel.

B. There can be no duty to indemnify as to cargo damage, in the absence of liability from Luckenbach to libelants.

C. Luckenbach's conduct was such as to preclude recovery of indemnity from Albina on any warranty theory.

D. The personal injury indemnity cases relied upon

by the Court are not controlling in a cargo damage case.

E. Luckenbach itself breached an implied warranty of seaworthiness and an express undertaking to provide water on the ship's fire line.

V.

The District Court erred in holding that Albina is not entitled to collect its repair bill from Luckenbach.

ARGUMENT

I.

The District Court Erred in Adopting Its Opinion as Findings of Fact and Conclusions of Law

In accordance with the proposal of counsel for Luckenbach, the Court's Finding II (R. 87) adopts its Opinion as Findings and Conclusions.

It is to be observed that the Court's Opinion (R 72-86) does not contain findings of fact or conclusions of law as such.

It is clear that the adoption of the Court's Opinion as Findings and Conclusions in this case was in direct contravention to Admiralty Rules, Rule 46½, which provides as follows:

> "In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under Rule 49."

The procedure followed by the District Court was also contrary to Federal Rules of Civil Procedure, Rule 52(a), which, insofar as here relevant, provides as follows:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *"

It is believed that the remarks of Judge Leon R. Yankwich on this subject are particularly appropriate here:

> "Ordinarily, opinions cannot take the place of findings. However, at times, the courts have accepted opinions instead of findings where the trial judge so ordered. The amendment to Rule 52 allows findings of fact and conclusions of law to appear in the opinion.
>
> "Personally, I do not think the practice is satisfactory. In the last analysis, an opinion is, or is supposed to be, a reasoned discussion of the legal issues involved. Of necessity, only so many of the facts as are necessary to the decision will be put in it. The result is that very few opinions, in a complex case, can actually serve in lieu of findings. And if the judge incorporates, as a part of the opinion, specific findings on the issues involved, the losing party is deprived of the opportunity to object to the findings and to suggest changes. * * *" (Yankwich, "Findings in the Light of the Recent Amendments to the Federal Rules of Civil Procedure," 8 FRD 271, 286.)

In the present case, the adoption of the Court's Opinion as findings and conclusions has greatly hindered the presentation of the issues on appeal herein in clear and concise form. For example, in formulating its Statement of Points on Appeal herein, appellant found it necessary,

to avoid a possible waiver of any prejudicial error, to review the Court's Opinion bit by bit to find each statement therein which it considered to be erroneous. In many instances, statements in the Opinion which appellant regards as erroneous are not readily identifiable as either findings, conclusions, or mere *obiter dictum*.

As a result, the Statement of Points on Appeal contains one point (Point II, R. 618-623) which contains 27 subparts, directed toward various statements found in the Court's Opinion, in addition to 18 other points, each of which is directed toward some specific finding or conclusion of the District Court. See also Appellant's Specifications of Error, supra, pp. 20-28.

Appellant does not suggest that the decision of the District Court should be reversed solely on the basis that the District Court did not fully state its findings separately from its conclusions of law. However, in the event that this Court finds a reversal on the merits to be appropriate, appellant does urge that further proceedings herein, if such are necessary, will be greatly facilitated and clarified by a distinct statement of the District Court's Findings of Fact, stated separately from its Conclusions of Law.

II.

The District Court Erred in Holding that Luckenbach Is Not Liable Directly to Libelants

The District Court concluded that the fire was not caused by the design or neglect of Luckenbach within the meaning of the Fire Statute, 46 U.S.C.A., § 182 (Con-

clusion I, R. 91), and that Luckenbach is not liable to libelants for the cargo loss, damage, expense, or otherwise (Conclusion II, R. 91). Presumably, it was the District Court's conclusion that Luckenbach was absolved from liability by virtue of the Fire Statute.

It seems relatively certain that but for the Fire Statute and irrespective of whether or not Albina was also liable to libelants, Luckenbach would be liable to libelants for their cargo damage not only on the basis of negligence and unseaworthiness, but as a carrier and bailee of the libelants' goods which it failed to deliver in sound condition.

Be this as it may, appellant believes it clear that the Fire Statute is not properly applicable to this case. Albina's argument as to Luckenbach's fault, aside from the Fire Statute, is more fully set forth in subsequent portions of this brief. Therefore, Albina's argument with respect to Luckenbach's direct liability to libelants in the first instance is confined to a discussion of the Fire Statute as related to this case.

The Fire Statute

Luckenbach claims it is absolved from liability to libelants herein by virtue of 46 U.S.C.A., § 182, commonly known as the Fire Statute (and which was incorporated in the bills of lading, Ex. 6-A to 6-F. See R. 108, 465; these exhibits were transmitted to the Clerk of this Court, but were not printed in the Transcript of Record). This enactment reads as follows:

"No owner of any vessel shall be liable to answer for

> or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

It is well established that within the meaning of this statute "neglect" refers to the neglect of the owner personally, or, in the case of a corporate owner, to the neglect of managing officers and agents as distinguished from that of the master or other members of the crew. *Consumers Import Company v. Kabushiki Kaisha Kawasaki Zosenjo,* 320 U.S. 249, 88 L. Ed. 30 (1943); *Gosho Company v. The Pelican State* (D.C.N.Y., 1957), 151 F. Supp. 780.

It has been held that the owner of a vessel is chargeable with the negligence of a traffic manager employed by the owners who, in the absence of a general agent, had supervision over the condition of the ships as they came in and of any repairs they might need and whose word was final about their proper care in port, even though the traffic manager's superior was the owner's general agent, who was normally present in the port. *Great A. & P. Tea Company v. Lloyd Brasileiro* (CCA 2, 1947), 159 F. 2d 661, cert. den. 331 U.S. 836, 91 L. Ed. 1849.

The District Court made no specific finding as to whether or not Luckenbach's Port Engineer, Herbert Sterling, was a managing officer or agent of Luckenbach within the meaning of the Fire Statute. However, it is clear, under the case last cited, that Sterling was such

a managing officer or agent. Mr. Sterling himself testified that he had various duties as company representative for lots of ships' business, and that a part of those duties was arranging for the performance and completion of ship's repairs for vessels coming into port (R. 314). Mr. John Sutherland, Assistant Secretary of Albina, testified that normally Albina's repair work on Luckenbach ships was verbally authorized by Sterling or his assistant, and that there was no limitation on the size of the jobs that were authorized orally by Mr. Sterling (R. 587).

With respect to the specific repairs involved in this litigation, it appears that Sterling orally ordered both the removal of a section of the fire line, and the repair of a ladder in No. 5 hold (R. 315, 316, 487). It seems inescapable that as the Luckenbach representative responsible for seeing that necessary repairs were made to the vessel when she came into port, Sterling was also chargeable with responsibility for seeing that an alternate source of water was made available for the ship's fire system, when a section of the fire main was removed.

It appears from Sterling's own testimony that he was informed of the effect of removal of the section of fire line and was aware that the fire system could have been maintained in an operable condition by connecting a hose from a shoreside hydrant (R. 321-323). Apparently, Sterling's only attempt to discharge his responsibility in this regard was to ask the chief engineer if he could handle the situation and to rely wholly on the chief engineer's assurance that he would do so (R. 321-323). It appears that Sterling did not concern himself with this

important safety measure otherwise than as just indicated; indeed, he testified that he didn't feel that there was any further responsibility encumbent [sic] upon him in this regard (R. 328).

It is submitted that a reasonably prudent man in Sterling's position would have taken some further steps to see that the alternate connection to the fire system had actually been made. In this connection, it is to be observed that Sterling was aboard the ship until, in his own words, "about a quarter to 4:00" (R. 317). It appears that the removal of the fire main had been completed no later than 3:00 p.m. (R. 434; 521). The evidence also shows that the coupling, where a hose to supply water from a shore hydrant to the ship's fire line might have been connected, was almost directly at the gangplank going ashore (R. 512). Thus, it appears that in leaving the ship, Sterling must have walked right by the very fittings where by a quick glance he could have determined whether or not the shore connection to the fire line had been made (R. 518). Either he failed to make such observation,* or, observing that the connection had not been made, failed to do anything to remedy the situation. In either event, he was clearly derelict in discharging his responsibility to see that the ship's fire line was supplied with water while the section of the fire main was removed.

As to Radovich, Luckenbach's Marine Superintendent, the Court found that he was a mere subordinate employee and was not a managerial officer (Finding VI,

*See *Verbeeck v. Black Diamond SS Corp.* (CA 2, 1959), 269 F. 2d 68, 71, where it is said that "Liability may not be avoided [under the Fire Statute] by speculation as to the extent to which the officers of the managing company kept themselves in ignorance of its business."

R. 88). Such findings are wholly unsupported by the evidence. The Court further found, with respect to Radovich, that "his functions were confined to Luckenbach's dock in Portland, where he arranged for the loading or discharge of cargo. He reported to his superiors in the Portland uptown office. He had nothing to do with repairs." (Finding VI, R. 88.)

It is true that Radovich's duties included the arranging for loading and discharging cargo,* but the Court's findings that his functions were confined to the Luckenbach dock and that he reported to superiors in the Portland uptown office are not substantiated by one shred of evidence.

The only evidence with respect to Radovich's duties is to be found in his own testimony and in the testimony of Albina's personnel as to their dealings with him. Radovich testified as follows (R. 214):

> "Q. And what, specifically, do the duties entail, with respect to Marine Superintendent?
>
> "A. It entails the hiring, the supervising of personnel, dealing with the loading and discharging of cargo, and in part, as liaison between the ship and our offices in various ports, and in Portland specifically.
>
> "Q. Do you have any association with repairs to be effected by contractors or otherwise?
>
> "A. No, I don't."

Radovich also testified to the effect that he was aboard the S.S. Robert Luckenbach numerous times on the day

*A shipowner's representative who is responsible for supervising the loading of cargo is a managerial officer or agent, for purposes of the Fire Statute. *Williams S.S. Co. v. Wilbur* (CCA 9, 1925) 9 F. 2d 622.

of the fire, because he had to observe the loading and discharging of cargo which was his specific function (R. 215).

Radovich's testimony, quoted above, to the effect that he had no association with repairs to be effected by contractors, is possibly misleading. As will be seen, other evidence indicated that although perhaps he did not have the responsibility of determining what repairs were to be made, he did have the responsibility of coordinating the loading and discharge of cargo with the activities of repair crews.

In the course of explaining his activities when he reboarded the ship at five or ten minutes after six on the day of the fire, Radovich mentioned going to No. 2 hatch and climbing down to the lower 'tween deck to the top of the deep tanks. He mentioned a critical problem with respect to the discharge of cargo from those deep tanks. When the Coast Guard Investigating Officer asked Radovich to explain the nature of the critical problem relative to the deep tanks, his answer was as follows:

> "We had—I was directed to attempt to have the deep tanks discharged of cargo and cleaned relative to some ship repair work to be done in the lower 'tween deck of number two hatch. We had made arrangements that we would attempt to have it ready by eight a.m. in the morning, and I had to determine whether or not it would be required to relieve that longshore gang between twelve and one a.m., to facilitate getting the cargo discharged and the hatch cleaned up as he wished it to be." (R. 216.)

This explanation of one of his problems shows that Radovich's duties included the coordination of cargo dis-

charge with the performance of ship repairs, a conclusion further supported by the testimony of Richard Brewer, one of Albina's Superintendents. Brewer testified as follows (R. 495):

> "Q. In connection with the doing of the work in the hold of the ship and where it is necessary to remove cargo, who in the past, when you were working on the Luckenbach ships, arranged for the removal of cargo?
>
> "A. Well, that would be arranged through Mr. Radovich."

The same witness also testified, in response to questions about Radovich's authority with respect to repairs that:

> "We frequently looked to him as to the time that we could do them. I mean it was up to him when the space would be available." (R. 504.)

It is inescapable that since Radovich's general duties included arranging for the discharge of cargo from holds where repairs were to be performed and specifying the times when space would be available for repair work, it was his specific duty on the occasion in question to see that cargo was removed from No. 5 hold to permit welding to be done there. Indeed, he expressly undertook to do so (R. 491, 495, 498).

Radovich not only knew that repairs involving welding were to be performed in No. 5 hold between 6:00 and 7:00 p.m. and that it was the forward ladder where this work was to be done, he expressly ordered the work to be done at that time (R. 502, 503). However, when Albina's welding crew arrived to repair the ladder in No. 5 hold, there was cargo consisting of burlap and construc-

tion paper in the forward part of the hold within two to four feet of the ladder itself (Agreed Facts, R. 53). It is obvious that Radovich failed to properly discharge his duty to see that the cargo was safely removed from the area where he knew welding was to be performed. Had he done so, there would have been no flammable burlap, construction paper, or other cargo within the area of the welding operations, and there would have been no fire in the first instance.

It is submitted that clearly Sterling and Radovich were both managing officers or agents within the meaning of the Fire Statute, and that the negligence of both contributed to the loss sustained by the libelants. Had Radovich seen to it that the flammable cargo was removed from the area forward of the forward ladder, there would have been no fire at all. Had Sterling seen to it that an alternate source of water was connected to the ship's fire line, after removal of a section of the fire main, the damage to cargo would have been minimal, and there would have been no damage whatever to the ship.

The District Court said (Opinion, R. 82) that "* * * the burden is on the libelant to prove that the neglect of the owner did cause the fire." This, it is submitted, is erroneous. See *Verbeeck v. Black Diamond* (CA 2, 1959), 269 F. 2d 68, 71, where it was held that once negligence had been shown, the burden of proof of coming within the exemption from liability of the Fire Statute is on the owner. The opinion in the *Verbeeck* case was, on rehearing, vacated and the cause remanded for further findings, but it is apparent that the later

opinion did not undertake to reverse the holding as to burden of proof. 273 F. 2d 61, 63.

See also Gilmore and Black, The Law of Admiralty (1957), pp. 705, 706, n. 106, where it is urged that both under the Limitation Act and under the Fire Statute the libelant has the burden of proving negligence, but the shipowner has the burden of proving the absence of privity or knowledge. The authors cite *The Arthur N. Herron* [In re American Dredging Co.] (CA 3, 1956), 235 F. 2d 618, in support of their position but concede that some cases (such as those cited by the District Court herein, R. 82) support a contrary view, but point out that such decisions are doubtless prompted by a confusion of terms. They conclude: "It is believed that the rule should be as in the limitation cases: burden on the libellant to show negligence or fault; burden on the owner to show his (personal) freedom from 'design or neglect.' No doubt the conjunction of the terms 'neglect' and 'negligence' has stimulated the suggestion that in fire statute cases the libellant bears the burden on both aspects of the case."

Here, the evidence is abundant that negligence on the part of Luckenbach's personnel caused or contributed to the start and the spread of the fire. The burden was then on Luckenbach to show, if it could, that none of its negligent employees were managerial officers or agents within the meaning of the Fire Statute. There was no such showing made. On the contrary, the evidence adduced affirmatively shows that both Sterling and Radovich *were* such managerial officers or agents.

It is Albina's position that even if it is held to share responsibility for the start of the fire, the record here is sufficient to show that its conduct was in no event responsible for any loss greater than the value of the burlap bags and construction paper which were stowed forward of the forward ladder in No. 5 hold (Agreed Facts, R. 53). The uncontradicted testimony of Larson, the welder who stayed in the hold to handle the fire hose after the fire broke out, was that up to the time he left the hold after waiting futilely some six minutes for water to come through the hose, the fire was still confined to a relatively small area in the cargo of burlap (see Statement of Case, supra, pp. 12, 13). His testimony that he could have put the fire out had he had water in the hose is substantiated by the testimony of Assistant Chief Kenneth Post of the Portland Fire Department, who testified, in part, as follows:

> "Q. * * * Now, in your experience in fighting fires —combatting fires—have you not found that earliest application of fire-fighting methods to a fire is normally the most effective?
>
> "A. Oh, yes.
>
> "Q. Such as minimizing damage?
>
> "A. Yes, you can put a fire out with a bucket, usually, if you can get to them to start with.
>
> "Q. So, in other words, in this particular case, had water been able to be applied even earlier than your arrival, you feel that the extent of the fire would have been lessened considerably?
>
> "A. Yes. I don't know how the fire started, but it couldn't have started very big—you could put it out with pretty near anything. Surely a small hose line would have put it out when it started." (R. 407.)

Thus, it appears certain that had there been water

available on the ship's fire line, damage would have been limited to a part of the cargo of burlap. However, even assuming that the cargo of construction paper on top of the burlap would have been damaged from fire, smoke or water, the value of that cargo together with the burlap would constitute the limit of Albina's liability. All further damage to cargo, and the entire damage to the ship, was caused by Luckenbach's failure to provide water on the fire line.

If Luckenbach disagrees as to what part of the damage is attributable to its neglect, it was incumbent upon Luckenbach to show what part of the damage was attributable to some other cause. In the absence of such showing, then Luckenbach, as between it and the libelants, is responsible for the entire loss.

Attention is invited to the recent decision of this Court in *American Mail Line, Ltd. v. Tokyo Marine & Fire Insurance Co.* (CA 9, 1959), 270 F. 2d. 499. In that case, cargo interests filed a libel to recover the value of non-delivered cargo, consisting of bulk barley which was destroyed by fire aboard ship. The shipowner set up the Fire Statute and the Carriage of Goods by Sea Act as defenses and filed a cross-libel to recover the ship's share of general average. The trial court found and this Court agreed that the fire started as the proximate result of negligence by the officers and the crew and that the neglect of the shipowner's port captain, after the vessel reached port, caused the fire to spread and additional cargo to be damaged or destroyed. A decree in favor of libelant for the full amount of the loss and dismissing the cross-libel for general average contribution was affirmed.

As to the shipowner's defenses based on the Fire Statute and upon the Carriage of Goods by Sea Act, this Court said:

> "* * * The carrier is not being held liable for damage caused by the onset of fire and destruction caused thereby. The fire was started because of the negligence of the officers and crew of the ship. The carrier was not in privity with the officers and crew and cannot be held liable for their default in starting the fire. However, it is the duty of the carrier to use reasonable precaution to protect cargo from any type damage. The findings of the trial court, which we have confirmed, show that the carrier failed to use reasonable precaution and to take the measures which a reasonably prudent person would have taken to control the fire after it knew or should have known of the existence thereof in No. 1 hold. *This duty exists irrespective of who was primarily responsible for the setting of the fire.*
>
> "Tokyo Marine carried its burden and thus established the negligent failure to take proper precautions to stop a fire which had already been set. Unquestionably, damage has resulted proximately from this negligence. It was incumbent upon the carrier to prove affirmatively any factor or substance which tended to minimize the damage. Inasmuch as there was no way of telling how much of the damage was caused before the Port Captain was notified, it is not unreasonable to assess the whole amount against the carrier. If the Port Captain had acted with reasonable promptitude, the carrier would have been exonerated and no question as to the amount of damage would have arisen, for there would have then been no liability. In view of the situation and the findings of the trial court, there is no defense available to the carrier based upon either of the statutes quoted." (270 F. 2d 501, 502, emphasis added.)

The District Court attempted to distinguish the above

case on the basis that there the negligence of the managing agents occurred after the fire had started, while in the instant case there was no showing of any negligence by anyone after the fire had started (R. 83, 84). It is submitted, however, that this is a difference without a distinction. In the instant case, overlooking for the moment Radovich's negligence in failing to remove the cargo as a proximate cause of the fire starting, Sterling's negligence in failing to see that there was water available on the ship's fire line assuredly caused the fire to spread and greatly increased the extent of the damage. His negligence directly and proximately caused the damage to be much greater than would have been the case if there had been water on the fire line, just as the carrier's negligence in *American Mail Line,* supra, increased the extent of the damage in that case. Sterling's negligence, which preceded the outbreak of the fire but which took effect afterwards so as to render impossible the prompt extinguishment of the fire, can be no less culpable, in contemplation of law, than the owner's negligence in *American Mail Line* where the negligence both occurred and took effect after the fire had started.

Other decisions supporting the proposition that where a shipowner fails to affirmatively show what part of damage sustained by cargo resulted from causes for which the shipowner is not legally responsible, the shipowner is held for the entire loss, include *Schnell v. The Vallescura,* 293 U.S. 296, 79 L. Ed. 373 (1934); *Great A. & P. Tea Company v. Lloyd Brasileiro* (CCA 2, 1947), 159 F. 2d 661, cert. den. 331 U.S. 836, 91 L. Ed. 1849; *Bunge Corporation v. Alcoa Steamship Co.* (D.C.N.Y., 1955), 133 F. Supp. 311.

To summarize with respect to the Fire Statute, Radovich's failure to have the flammable burlap removed from the area where he knew welding was to be performed constituted neglect of the owner within the meaning of the Fire Statute, and was a proximate cause of the commencement of the fire, regardless of whether or not Albina's conduct also amounted to negligence. Further, Sterling's negligence in failing to see that an alternate source of water was connected to the ship's fire line after a section of the main had been removed was also neglect of the owner within the meaning of the Fire Statute.

Since Luckenbach's failure to remove the burlap from the hold before the welding started was neglect of the owner which constituted a contributing cause of the fire in the first instance, it appears that Luckenbach is liable to cargo for the full amount of the damage, regardless of whether Albina is or is not also liable for any of the loss sustained by cargo. Even if no "neglect of the owner" contributed to the start of the fire, Luckenbach might escape liability for the damage to the burlap and construction paper but would still be liable for the damage to all other cargo, in that Sterling, clearly a managerial officer within the meaning of the Fire Statute, failed to take proper steps to insure that a fire could be promptly extinguished once it started.

If the Court cannot from the evidence determine what part of the loss can be attributed to the failure of the fire line, Luckenbach must be liable to cargo for the full amount of the damage under the doctrine of the *American Mail Line* case, and the other cases cited above.

Hence, the Fire Statute is not applicable and the Court erred in holding that Luckenbach is not liable to libelants.

III.

The District Court Erred in Holding that Negligence by Albina Was the Sole Proximate Cause of Damage Sustained by Libelants and by Luckenbach.

A. *Luckenbach was Negligent in Failing to Remove Cargo.*

The facts with respect to Luckenbach's direction that the welding was to be performed on the forward ladder in No. 5 hold between 6:00 and 7:00 p.m., Radovich's duty to remove the flammable cargo from that area if it was likely to create a hazard with respect to the welding, and Luckenbach's failure to so remove the cargo have been discussed above.

It should suffice to state here that if Albina was negligent in welding in close proximity to this cargo, as found by the District Court (Opinion, R. 77, 78), Luckenbach was at least equally at fault in failing to remove the cargo from an area where it ordered that welding be done. Clearly, if the presence of the cargo created a hazard, it was the responsibility of Luckenbach, not Albina, to remove the cargo. Short of actually refusing to proceed with the work as directed, there was nothing Albina could do about the presence of the cargo but to accept it as an existing condition and to proceed with the work, taking such precautions as were considered necessary.

B. *Luckenbach Was Negligent in Failing to Supply Water on the Ship's Fire Line.*

Luckenbach's failure to provide an alternate source of water for the ship's fire line, after ordering removal of a section of the fire main, has also been discussed above.

However, it should be here noted that, regardless of whether Luckenbach's failure in this regard is to be deemed "neglect of the owner" within the meaning of the Fire Statute, such failure was neglect either of the owner or of the vessel's crew, and clearly was a contributing cause to the damage, since it is clear that any damage would have been minimal had water been available on the ship's fire line.

C. *Luckenbach Was Negligent in Failing to Have Vessel Competently Manned.*

As was pointed out in appellant's Statement (supra, pp. 15, 16), there was, at the time the fire started, no member of the ship's crew aboard who was aware that the vessel was without an operable fire system or how to correct the situation. The circumstances giving rise to this condition present an appalling example of indifference to the need for communication of vital information on the part of the ship's engineering department.

Hebert, the Chief Engineer, who had assured Sterling that he would see that an alternate connection was made to the fire line (supra, p. 14), went ashore between 5:20 and 5:30 without leaving any particular instructions with his subordinates (R. 277). He said his First and Second Assistants were advised that the fire main

system would be out of operation, but that he did not think anyone in the deck department had been so advised (R. 285).

Beutgen, the First Assistant, was aware of the status of the fire line (R. 434), but he went ashore before the fire started (R. 431) and returned after the arrival of the Fire Department (R. 432). He asserted that all of the other engineers were appraised that the fire line was defective and had been temporarily repaired while at sea (R. 435, 436). He also said the Second Assistant knew about the removal of a section of the main, but that he couldn't be sure as to the Third or Junior Third Assistants (R. 437).

Porter, the Second Assistant, testified that he was on watch and in the engine room when the section of fire main was removed, but that he did not witness the actual removal (R. 454), and did not learn of the removal until after the fire (R. 455). In any event, he went off watch at 4:00 p.m. (R. 454) and went ashore as soon as he could get off (R. 462); he did not return to the ship until about 7:20 the next morning (R. 462).

Elixson, the Junior Third Assistant Engineer, was the engineering watch officer on duty from four to midnight, the period during which the fire started (R. 298). He was not aware of any repairs being made to the fire main system (R. 298). He did not discover that a section of the fire main was missing until the firemen had arrived and had water in the hold (R. 300).

The Third Assistant Engineer did not testify, and there is no evidence as to his whereabouts when the fire broke out.

As to the deck officers, Captain Maitland testified (R. 204) that he had no knowledge of any repairs to the fire main system, as did Jansen, the Chief Officer (R. 341). Both of these officers were ashore when the fire started (R. 206, 341).

Protic, the Junior Third Mate, was watch officer when the fire broke out (R. 233). He had not been apprised of any repairs being effected when he went on watch (R. 234), and so far as he was aware they were "a live ship" and all facilities including the fire system were available (R. 235).

Kand, the Third Mate, was aboard ship when the fire broke out (R. 252, 253), but it is obvious from his description of efforts to utilize the ship's fire hose that he was not aware that the fire system was inoperative (R. 255-261). The Second Mate did not testify, and there is no evidence indicating that he had any knowledge as to the status of the fire main system.

There is no need to determine here which of these various officers, as between themselves, was most responsible for the ensuing disaster. None of those who had knowledge that a section of fire main had been removed were aboard the ship when such knowledge was needed; none of those who were aboard had such knowledge. Surely such a condition could not arise except through negligence on the part of some one or more of them in failing to communicate this knowledge to the officers on watch, together with any necessary instructions as to how water could be supplied to the fire system if needed.

D. *Luckenbach Was Guilty of Statutory Fault, Although Albina Was Not.*

THE CITY ORDINANCE

It appears that Luckenbach was in violation of various Coast Guard regulations which were applicable to the owners and operators of vessels but which were not applicable to repair contractors such as Albina. These violations will be discussed below.

First, however, it is to be noted that the District Court erred in holding (R. 79) that § 16-2527 of the Police Code of the City of Portland could constitutionally be applied here, against either Luckenbach or Albina, and that there is no conflict between such ordinance and applicable Federal statutes and regulations. This ordinance, a copy of which was admitted in evidence as Libelants' Exhibit No. 4 (R. 105), over Albina's objection (R. 103), provides as follows:

> "*Section* 16-2527. *Burning and Welding.* When any welding or burning is in progress, on any vessel, a suitable fire hose, with nozzle attached, shall be connected with a nearby fire hydrant and a test must be made, before any such welding or burning commences and occasionally while it is still in progress and said hose shall remain, ready for instant use, at least for one hour after any such welding or burning has been completed. A test must be made from time to time during the progress of any such operations. A competent attendant, equipped with not less than one, four pound, CO2 fire extinguisher, at hand and ready for instant use, shall be on hand and ready to act during each such welding or burning operation. If during any such operation, there will be a transmission of heat, through a bulkhead or above or below a deck where any such work is being done, a fire

watch shall be maintained on both sides of the bulkhead or deck. Special attention shall be given where any such operations take place, near a refrigerator compartment or ventilator from any gaseous hold or compartment."

Counsel for cargo contended (R. 104) and the District Court apparently agreed (Opinion, R. 79) that the validity of the ordinance is established by 46 C.F.R., § 146.01-12, which provides as follows:

"Nothing in the regulations in this sub-chapter shall be construed as preventing the enforcement of reasonable local regulations, now in effect or hereafter adopted, when such regulations are not inconsistent or in conflict with the provisions of the regulations in this part."

Albina has no quarrel with the policy expressed in the above regulation, which is merely a condification of the long-recognized admiralty rule that states or municipalities may enact local maritime regulations with respect to such matters as moorage, where not in conflict with recognized maritime principles or federal statutes. *United States v. St. Louis & M.V. Transp. Co.,* 184 U.S. 247, 255, 46 L. Ed. 520 (1902); *The James Gray v. The John Fraser,* 62 U.S. (21 How.) 184, 16 L. Ed. 106 (1859); *The S.S. New York v. Rae,* 59 U.S. (18 How.) 223, 15 L. Ed. 359 (1856); *The Vera* (D.C. Mass., 1914), 224 F. 998; *The Nettie Sundberg* (D.C. Calif., 1900), 100 Fed. 886.

The mere statement of that principle, however, either as established by the above cases or as codified in 46 C.F.R., § 146.01-12, supra, tells us nothing with regard to whether the Portland city ordinance in question is rea-

sonable, or whether it is inconsistent or in conflict with recognized maritime principles, or federal statutes or regulations. See *E. I. DuPont DeNemours & Co. v. Board of Standards, etc., of The City of New York,* 158 NYS 2d 456, 5 Misc. 2d 100 (1956).

A guide to the factors determinative of whether such a local regulation is to be deemed invalid as repugnant to federal enactments is to be found in *Kelly v. State of Washington ex rel Foss,* 302 U.S. 1, 82 L. Ed. 3 (1937). In that case, the U.S. Supreme Court upheld a statute of the State of Washington, relating to inspection, regulation and licensing of motor vessels, upon the theory that the state enactment did not conflict with any federal enactments. The court said (302 U.S. at p. 15):

> "If, however, the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises."

There can be little doubt that the ordinance in question does attempt "to impose particular standards as to * * * equipment and operation which * * * may be desirable but pass beyond what is plainly essential to safety and seaworthiness."

The City of Norfolk (CCA 4, 1920), 266 F. 641, cert. den. 253 U.S. 491, 64 L. Ed. 1028, is also instructive.

The Supreme Court held that a vessel moored partly in the channel but not so as to obstruct navigation, could recover full damages from a moving vessel which collided with the anchored vessel, even though a local harbor regulation absolutely prohibited anchoring in the channel. The other relevant facts and the pertinent holding are summarized in the following passage from the court's opinion (266 F. at 644):

> "* * * [The] federal statute allows anchoring in a channel when it does not prevent or obstruct navigation, while the local regulation forbids it. If, while the local rule above quoted was in force, the board of harbor commissioners had made another rule in the terms of the federal statute, obviously the old rule containing the absolute prohibition would have been completely abrogated. Surely the act of Congress on the subject must have the same effect. We hold, therefore, that the local rule is supplanted by the federal statute of 1899."

Similarly, in the instant litigation, federal legislation and regulations promulgated by the Coast Guard (more specifically designated below) permit welding in the hold of a ship, under certain conditions, without having a tested fire hose at hand and without an attendant equipped with a CO2 fire extinguisher. The City of Portland ordinance purports to forbid welding without such equipment and attendant, and similarly, therefore, the local rule is supplanted by the federal regulations.

In the cases cited below state or local enactments were also held invalid as infringing upon areas preempted by federal government: *Omaha Packing Co. v. Pittsburg, F.W. & C. Ry. Co.* (CCA 7, 1941), 120 F. 2d. 594; *Gilvary v. Cuyahoga Valley Ry. Co.,* 292 U.S. 57, 78 L. Ed.

1123 (1934); *United Dredging Co. v. City of Los Angeles* (D.C. Cal. 1926), 10 F. 2d 239, aff'd (CCA 9, 1926), 14 F. 2d 364.

The specific federal statutes and regulations with which the Portland ordinance is in conflict include: 46 U.S.C.A., § 463(a), authorizing the Coast Guard Commandant to prescribe provisions to guard against and extinguish fire on steam vessels; 46 U.S.C.A., § 170(7), directing the Coast Guard Commandant, by regulations, to define explosives or other dangerous articles and to regulate the handling, stowage, etc., of such cargo; 46 C.F.R., part 95 which prescribes detailed requirements for Fire Protection Equipment aboard vessels,* and 46 C.F.R., § 146.02-20 (See Libelants' Ex. 3, admitted in Evidence, R. 103) prohibiting, under designated conditions, repairs or work involving welding or burning aboard vessels.

These federal statutes and regulations impose strin-

---

*Albina's Exhibit 41, which was received in evidence (R. 469), lists the Subpart headings under 46 C.F.R., part 95, the purpose being to indicate, in part, the scope of federal regulations in this field. These subpart headings are as follows:

Subpart 95.01—Application [to all vessels except as specificially noted].

Subpart 95.05—Fire Detecting and Extinguishing Equipment, Where Required.

Subpart 95.10—Fire Main System, Details.

Subpart 95.13—Steam Smothering System, Details.

Subpart 95.15—Carbon Dioxide Extinguishing Systems, Details.

Subpart 95.17—Foam Extinguishing Systems, Details.

Subpart 95.20—Water Spray Extinguishing System, Details.

Subpart 95.50—Hand-portable Fire Extinguisher and Semi-portable Fire Extinguishing Systems, Arrangements and Details.

Subpart 95.60—Fire Axes.

gent and detailed requirements as to fire prevention and extinguishment aboard vessels, and define certain conditions under which welding may and may not be performed on vessels. No federal statute or regulation requires that during welding aboard vessels an operable and tested fire hose be near at hand, or that an attendant equipped with a CO2 fire extinguisher be on hand; nor does any federal statute or regulation prohibit welding in the absence of such equipment or attendant.

Thus, it is clear that the city ordinance imposes burdens in addition to those imposed by the federal authorities. It is difficult to conceive a situation where it would be any more obvious that federal authorities have occupied a particular field, in which they have imposed specific standards and requirements, and where local authorities have attempted to impose additional standards and requirements within the same field.

It should also be observed that this is an area in which the uniformity of the maritime law should not be impaired by varying local regulations; in cases involving a subject which demands uniformity of regulation, state or local legislation is prohibited, even in the absence of conflict with an express federal enactment. *Kelly v. State of Washington ex rel Foss,* supra, 302 U.S. 1, 9, 82 L. Ed. 3, 10. It is common knowledge that welding aboard vessels to effect voyage repairs is a frequent and necessary practice; many ships carry their own welding equipment so that the crew may accomplish such repairs even while at sea, if necessary. It is not improbable that a single ship might require repairs involving welding at several ports

of call during the course of a single voyage. Under these circumstances, uniform federal regulation of the conditions under which welding may be performed on vessels is essential; to allow local authorities to impose additional and varying regulations in every port would impose an insufferable burden upon maritime commerce.

Further, it should be observed that strict compliance with the terms of the ordinance would not, so far as appears, have prevented the fire. The immediate presence of a tested fire hose, or of an attendant equipped with a CO_2 fire extinguisher might have made it possible to extinguish the fire sooner, but would have had no tendency whatever to prevent sparks or molten material from igniting the burlap. Thus, the District Court erred in finding [Finding XIII, R. 90] that if various precautions, including compliance with the ordinance, had been taken there would have been no fire.

Hence, the city ordinance under discussion can have no application to this case, and neither Luckenbach nor Albina can be held to be negligent by reason of any violation of such ordinance.

Coast Guard Regulations

The District Court indicated that it believed Albina to be negligent by reason of violation of 46 C.F.R., § 142.02-20, prohibiting repairs involving welding or burning in holds containing dangerous articles (R. 78,79). The court also rejected, without explanation of its reasoning, Albina's contention that such regulation is not applicable to a repair contractor working aboard a vessel (R. 79).

The applicability of this Coast Guard regulation is governed by 46 C.F.R., §§ 146.02-2 to 146.02-5, as set forth in Albina's Exhibit 43 (admitted in evidence, R. 470). The regulations in subchapter 146.02, Code of Federal Regulations, Title 46, are expressly made applicable to vessels (46 C.F.R., § 146.02-2), to shippers of explosives or other dangerous articles or substances (46 C.F.R., § 146.02-3), and are declared to be binding upon certain other persons, namely, owners, charterers, agents, masters, or persons in charge of vessels, and upon all other persons transporting, carrying, conveying, handling, storing or stowing explosives or other dangerous articles or substances on board vessels (46 C.F.R., § 146.02-4). The applicability of these regulations is not extended to repair contractors, or to any other category of persons which might be deemed to include Albina.

Since it appears that violation of such regulation is punishable by fine or imprisonment, pursuant to 46 USCA § 170 (14) and (15), the regulation is to be deemed penal in nature, and should not be expansively interpreted so as to apply to persons or situations not clearly within its purview. *McHoney v. Marine Navigation Co.* (CA 4, 1956), 233 F. 2d 769.

If 46 C.F.R., § 146.02-20, has any application at all to this case, it was applicable only to Luckenbach as the owner and person in charge of a vessel, and perhaps as a person transporting dangerous articles or substances. Since this regulation was not applicable to Albina in the first instance, Albina could not be deemed negligent by virtue of any noncompliance with its terms.

Since the District Court found that Albina was negligent, among other particulars, under libelants' specification of negligence No. 8 (Opinion, R. 79; Consolidated Pretrial Order, R. 60), it should be noted that such specification of negligence charges Albina with welding in a hold of the vessel containing cargo classified as dangerous. It should be observed that the Coast Guard's classification of various substances including burlap as hazardous articles (46 C.F.R., subchapter 146.27) is not binding upon Albina.

46 C.F.R., § 146.27-1 defines a hazardous article, for purposes of the regulations in that subchapter, as any article or substance having specified characteristics of flammability, or which are specifically named as hazardous, and declares that "this definition is binding upon all shippers making shipments of hazardous articles by any vessel and shall apply to owners, charterers, agents, master or other person in charge of a vessel, and to other persons transporting, carrying, conveying, storing, stowing or using hazardous articles on board vessels subject to R.S. 4472, as amended, and the regulations in this subchapter." Thus, since the regulations classifying various articles as hazardous expressly specify the persons upon whom such classification is binding, and since Albina does not fall within any of the categories of persons upon whom such classification is declared to be binding, it was erroneous to hold Albina negligent by reason of the classification of burlap as a hazardous article. See *McHoney v. Marine Navigation Co.*, supra, 233 F. 2d 769.

Luckenbach, however, would be bound by such classification as the owner or person in charge of a vessel, and

as a person transporting hazardous articles on board a vessel.

Thus, neither Luckenbach nor Albina may be deemed negligent by reason of any violation of the Portland city ordinance, since such ordinance can have no valid application to this case. Luckenbach is negligent per se for violation of some one or more of the various Coast Guard regulations restricting repair work involving welding in cargo holds where dangerous articles are stowed. Inasmuch as those regulations are not applicable to repair contractors, Albina cannot be deemed negligent per se by reason of any violation of any such regulations.

E. *The Vessel Was Unseaworthy.*

Libelants had the benefit of a warranty that the vessel on which their goods were carried was free from any unseaworthy condition which might arise through the default or privity of her owners. The question as to Albina's right to rely upon a warranty of seaworthiness is more fully discussed later in this brief (infra, pp. 72-75).

Appellant desires to here point out merely that the record clearly establishes that, at the time the fire broke out, the vessel was in fact unseaworthy in at least three particulars.

First, it would appear that the presence of flammable cargo within two to four feet of a ladder which was to be repaired by welding created a hazardous and unseaworthy condition.* As has been pointed out above, the

*Improperly stowed cargo renders a ship unseaworthy, as to either an injured worker or a cargo shipper. *Gindville v. American Hawaiian*

presence of this cargo must be attributed to the neglect of Radovich, a managerial officer or agent, and hence this condition is to be regarded as having arisen through the lack of due diligence by the owner.

Second, the inoperable condition of the ship's fire line was certainly an unseaworthy condition; a ship with inoperable fire-fighting equipment can scarcely be considered "reasonably fit to carry the cargo." *The Silvia,* 171 U.S. 462, 464, 43 L. Ed. 241 (1898); *Martin v. The Southwark,* 191 U.S. 1, 9, 48 L. Ed. 65 (1903). Inasmuch as this condition arose through the failure of Sterling, a managerial officer or agent, to see that an alternate source of water was connected to the fire line, it was due to the lack of due diligence by the owner.

Third, as has been mentioned above (see Statement, supra, pp. 15, 16), it appears that at the time the fire broke out there was no member of the ship's crew aboard who was aware that the main fire line was inoperable. The absence of any officer or member of the crew who knew that there was no water in the fire line, or why such condition existed, or how to remedy the condition rendered the vessel unseaworthy (see libelants' Contention II-2, Consolidated Pretrial Order, R. 57; Albina's Contention I-2, Consolidated Pretrial Order, R. 66, 67).*

S.S. Co. (CA 3, 1955) 224 F. 2d 746; *Palazzolo v. Pan-Atlantic S.S. Corp.* (CA 2, 1954) 211 F. 2d 277, aff'd sub nom; *Ryan S. Co. v. Pan-Atlantic,* 349 U.S. 901, 99 L. Ed. 1239; *Pioneer Import Co. v. The Lafcomo* (CCA 2, 1943) 138 F. 2d 907, cert. den. 321 U.S. 766, 88 L. Ed. 1063.

*For a vessel to be seaworthy, it must be manned by a generally competent master and crew, i.e., a crew competent to meet the exigencies of the voyage. *Boudoin v. Lykes Bros.,* 348 U.S. 336, 99 L. Ed. 354 (1955); *Spellman v. American Barge Line* (CA 3, 1949) 176 F. 2d 716; *The Rolph* (CCA 9, 1924) 299 Fed. 52, cert. den. 266 U.S. 614, 69 L. Ed. 468.

This unseaworthy condition may not be considered as arising through the personal neglect of the owner, precluding libelants from direct recovery against Luckenbach for this particular unseaworthy condition. However, Albina was entitled to a seaworthy vessel, or advice as to any unseaworthiness, and it is immaterial that the condition may have arisen without any lack of due diligence by the owners.

F. *Albina's Negligence.*

Albina was directed to do the welding in No. 5 hold between 6:00 and 7:00 p.m. and had the right to assume that Luckenbach had sufficiently cleared the area at the foot of the ladder of dangerous cargo. The welding crew thereafter employed the usual and customary methods for the prevention of fire. Nevertheless, there was competent evidence sustaining a finding that Albina's failure to take additional precautions proximately contributed to the start of the fire.

However, Albina does not concede that it was grossly negligent (Finding IV, R. 87; Finding XIII, R. 89), and urges that the District Court erred in so holding. Aside from the absence of any issue of gross negligence (see Contentions of parties, R. 56-69), the uncontradicted testimony of Smith, the welding foreman, as to the precautions taken (R. 124-125), and as to his belief that he had eliminated the danger (R. 130) refutes any finding of gross negligence.

Even though Albina's negligence contributed to the start of the fire, Luckenbach was also at fault and Luckenbach was solely at fault for most of the cargo damage

and all of the vessel damage because its fire system was inoperable and no officer or member of the crew knew how to place it in operation.

IV.

The District Court Erred in Holding Albina Liable to Indemnify Luckenbach for Breach of Implied Warranty of Workmanlike Service.

Although the District Court apparently rested its decision solely upon tort (e.g., Finding XIII, R. 89: "The fire was caused solely by the gross negligence of Albina * * *"), the Court found that Luckenbach was entitled to indemnity from Albina for breach of implied warranty of workmanlike service. The Court adopted Finding XV (R. 90) to the effect that Luckenbach had a right to and did rely on Albina to do the welding in a safe and workmanlike manner, and Conclusion III (R. 91) to the effect that even if liable to cargo, Luckenbach would have a right to indemnity from Albina for all sums it might be compelled to pay. The Court alluded to cases in which the owner of a vessel had been held liable to an injured longshoreman, with a right of indemnity over against the injured man's employer, a stevedoring contractor (Opinion, R. 85, 86). The District Court said:

> "I am unable to distinguish the logic or the soundness of the reasoning in the stevedoring cases from what should be the logic and the soundness of the reasoning in arriving at a proper conclusion in this case. The decisions in the stevedore cases control. I see no distinction between liability by way of indemnity and liability by way of direct damage or compensation." (Opinion, R. 86.)

In view of the breach by Luckenbach of its express undertaking to maintain water in its fire lines during the welding operations, there can be no claim to indemnity for most of the cargo damage or any of the vessel damage.

A. *No Liability on the Part of Albina as to Damage to Ship.*

Albina concedes that the evidence justified a finding that it was in some degree at fault with respect to the start of the fire. It does not follow that Albina should indemnify Luckenbach for damage to cargo attributable to its inoperable fire system, for fire damage to the ship, or for consequential damage which Luckenbach may have sustained as a result of the fire.

Any reasonable view of the evidence requires a finding that Luckenbach must assume at least equal responsibility for the start of the fire in that it failed to remove the flammable cargo from the area adjacent to the forward ladder in No. 5 hold, when it had directed welding to be performed there. Aside from that, the evidence clearly shows that had Luckenbach fulfilled its obligation to supply water to the ship's fire line, the fire would have been extinguished before it could have caused any damage to the ship herself (R. 576; see Statement, supra, pp. 12, 13). The damage to the ship was not proximately caused by any negligence of Albina, but by Luckenbach's failure to connect an alternate source of water to the fire line, and by its failure to have the vessel manned with competent personnel who were aware of the condition of the fire line and how to remedy it.

It is pertinent to refer here to the decision in *Southport Transit Company v. Avondale Marine Ways* (CA 5, 1956), 234 F. 2d 947. That was a civil action to recover damages for fire occurring on the plaintiff's tug while it was undergoing repairs on a marine railway in the defendant's shipyard. It was found that the fire started through negligence of the defendant's workmen but that it continued to burn, partly because of the negligence of the workmen of the plaintiff. The District Court found that there was contributory negligence by plaintiff and that this completely barred recovery in a civil action. The Court of Appeals reversed the decision with directions to enter an interlocutory decree for the plaintiff and ordering further proceedings for the apportionment of damages. The reversal was based on alternative grounds: first, that contributory negligence is not a complete bar to recovery in maritime causes of action whether pending as civil actions or in admiralty, and secondly, that properly speaking, the decision was not based on the doctrine of contributory neglignece at all. The Court said (234 F. 2d at 951):

> "* * * Rather it is, or is akin to, the one universally applied for both torts and contracts, generally described as the doctrine of avoidable consequences and under which a plaintiff, with an otherwise valid right of action, is denied recovery for so much of the losses as are shown to have resulted from failure on his part to use reasonable efforts to avoid or prevent them."

The *Southport* case, supra, supports our position that Luckenbach can recover nothing from Albina for so much of Luckenbach's damages as resulted from Luckenbach's

own default in failing to properly control the fire or to provide the means by which it could be controlled. This would include all fire damage to the ship and all of Luckenbach's consequential damages (as well as any amounts the parties are required to pay for loss of cargo other than the burlap and construction paper).

Assuming that Albina was negligent in conducting the welding operation, Albina would be liable for such damage as was reasonably foreseeable as a proximate result of its conduct. Concededly, it was reasonably foreseeable by Albina that if a fire should start as a result of the welding, there would be some damage to the cargo in the immediate area of the forward ladder. However, it was not reasonably foreseeable that Luckenbach would not have a competent crew available for fighting the fire, nor was it foreseeable that water pressure would not be available on the ship's fire line.

Consequently, it was not reasonably foreseeable by Albina that a small fire starting in the cargo of burlap should, by reason of Luckenbach's default, develop into a veritable holocaust, causing extensive damage to cargo in the after part of No. 5 hold, heat and water damage to cargo in No. 4 hold, and damage to the ship herself through heating and buckling of plates. All damage over and above the loss of the burlap and the construction paper must necessarily be considered to have been the proximate result of Luckenbach's failure to establish an alternate water supply system for fire protection purposes and to have a competent crew. Albina is not liable to cargo owners for losses other than that of the burlap

and the construction paper, nor can Albina be under any duty to indemnify Luckenbach for any other losses.

For an application of the foreseeability test in a maritime indemnity case, see *Reddick v. McAllister Lighterage Line* (CA 2, 1958), 258 F. 2d 297, cert. den. 358 U.S. 908, 3 L. Ed. 2d 229. In that case, McAllister owned a lighter; Clark, a stevedoring firm, had loaded the lighter; Reddick, a longshoreman, was employed by Cuba Mail to work in unloading the lighter. The lighter had been in McAllister's exclusive possession and control for two days between the loading by Clark and the unloading by Cuba Mail. In unloading operations, it was found that heavy crates stowed aboard the lighter were so close together that slings could not be put around them. Reddick was sent on top of the crates to pry them apart with a crowbar, to allow the placement of slings. He stepped on an apparently sound crate, one of its boards broke, and he fell over the side, sustaining personal injuries.

On appeal, the trial court's decree was affirmed insofar as it allowed Reddick recovery from McAllister, but McAllister's recovery over from Clark was reversed. The court said that even if Clark breached its implied warranty of workmanlike service by improper stowage, this was not the cause of the injury. It recognized that under *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 2 L. Ed. 2d 491 (1958), and other cases, tort theories of liability such as "active-passive" or "primary-secondary" are inapplicable when dealing with contractual indemnity problems. The court stated (258 F. 2d at 300):

> "* * * Under the general test of foreseeability applied to contractual liability, the breach must have been the cause of the injury. We think that in this case the latent defect in the board on the top of the crate was an intervening cause which broke any causal chain that might otherwise have existed."

On petition for rehearing, the court further stated (258 F. 2d at 303):

> "The petitioner urges that in exonerating Clark we have disregarded admonitions in [Weyerhaeuser v. Nacirema, supra] and have applied tort principles to the breach of the contract here involved. We do not agree. * * * We think Clark's breach was one which did not make 'the injury foreseeable as more likely to occur * * * and to mulct him * * * does not attain the purpose for which law and remedies exist. * * *' Corbin on Contracts, Vol. 5, p. 61.
>
> "The vastly extended scope of the warranty of seaworthiness under recent Supreme Court decisions has already shifted the stevedore's loss. The humanitarian objective of those decisions will not be furthered by judicial decisions which shift the stevedore's loss from one underwriter to another. And so we leave the loss on McAllister (and its underwriters) being convinced that under the doctrine of causation and foreseeability in the field of contracts that is where the loss belongs. Corbin on Contracts, Vol. 5, section 1006, et seq."

Thus, assuming that Albina was negligent with respect to starting the fire, it is not liable to indemnify Luckenbach for losses sustained by innocent third parties, the cargo, as the result of an intervening cause not reasonably foreseeable by Albina, namely, the failure of the ship's fire-fighting equipment, and the failure of her crew to render such equipment operable.

B. *Albina Cannot Be Required to Indemnify Luckenbach for Any Cargo Damage, in the Absence of Liability of Luckenbach to Libelants.*

It should be observed that to the extent the District Court may have relied on the stevedoring indemnity cases in concluding that Albina was liable for the full amount of the cargo damage (Opinion, R. 85, 86), those cases do not sustain the decision, since the Court concluded that Luckenbach was not liable to libelants for the cargo damage or otherwise (Conclusion II, R. 91).

In the stevedoring indemnity cases, such as those cited by the Court, there can be no liability on the part of the employer to indemnify the vessel or her owners, unless there was liability from the vessel to the injured workman in the first instance. *The Toledo* (CCA 2, 1941), 122 F. 2d 255, cert. den. 314 U.S. 689, 86 L. Ed. 551; *McAndrews v. U. S. Lines Co.* (D.C. N.Y., 1958), 1959 AMC 1575; see also *Donald v. Guy* (D.C. Va., 1903), 127 Fed. 228.

C. *Luckenbach's Conduct Precludes Recovery of Indemnity from Albina on Any Warranty Theory.*

The most compelling reason why Luckenbach cannot be entitled to indemnity from Albina on the basis that the latter breached any implied warranty of workmanlike service is to be found in the very stevedoring indemnity cases cited and relied upon by the District Court.

In *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 2 L. Ed. 2d 491 (1958), it was held

that a stevedoring company's duty to indemnify a shipowner on account of personal injuries suffered by an employee of the stevedore was based on contract and not on tort. It was also held that in the field of contractual indemnity cases in admiralty law the theories of active versus passive, or primary versus secondary negligence are inappropriate. It was recognized that certain negligent acts by the shipowner could bar it from seeking indemnity from the stevedore, but held that if the ship's only negligence was failure to inspect its equipment, it could recover from the stevedore, assuming the latter to have been guilty of negligence in using the equipment.

Under the reasoning of the *Weyerhaeuser* case, supra, it is to be noted that Luckenbach's negligence in the instant case is not a mere failure to inspect for or discover defective equipment, but rather it is neglect in failing to remove flammable cargo from an area where it had ordered welding to be performed, and flagrant neglect in failing to provide an alternate water supply system (in spite of an express undertaking to do so) when it knew that a section of the fire main had been removed, and in failing to man the vessel, at all times, with competent officers and crew who were aware that the fire main was inoperative and who knew how the situation could be remedied. Thus, it is not believed that the *Weyerhaeuser* case, supra, or any other case, establishes any right of indemnity by Luckenbach against Albina in the instant litigation, even if the personal injury indemnity cases are regarded as controlling.

D. *Personal Injury Indemnity Cases Are Not Controlling.*

The considerations that have caused the courts to allow indemnity over in a suit by a ship against the employer of a longshoreman who recovers damages from the vessel are not present in suits for damages by innocent third persons for injury to cargo. Here, the cargo claimants are seeking recovery for losses sustained by them as a result of fault on the part of Luckenbach or Albina, or both.

In the personal injury cases cited and apparently relied on by the District Court (Opinion, R. 85), the employer was protected by the Longshoremen's and Harbor Workers' Compensation Act against direct suit by the injured employee. The latter, however, had a right of suit against the vessel or the vessel owner for unseaworthiness, and if that unseaworthiness had been caused by the injured man's employer, the vessel was given indemnity over against the employer. In the case at bar, the cargo owners have sued both Luckenbach and Albina directly and either or both may be held liable, if they are shown to have been at fault. If both are at fault, the damages should be assessed against Albina and Luckenbach in proportion to their relative fault. See *Southport Transit Co. v. Avondale Marine Ways,* supra, 234 F. 2d 947.

Even if Albina's sole negligence is determined to have caused the fire, the intervening negligence of Luckenbach is assuredly responsible for the greater portion of the damage to the cargo and for all of the damage sustained by the vessel. In that situation, the Court can determine the extent to which Luckenbach is liable. If the negli-

gence of Luckenbach was a cause of the loss suffered by the cargo, it is not unjust that Luckenbach should bear that loss in proportion to its fault. In this litigation, there is no sound legal or policy reason why Albina should be held responsible for the entire loss, since a consideration of the evidence herein compels the conclusion that regardless of whether or not Albina's conduct amounted to negligence, the neglect of Luckenbach in the various particulars heretofore discussed was at least equally responsible for the loss.

E. *Luckenbach Itself Breached Implied Warranty and Express Undertaking.*

Even if it be assumed, arguendo, that Albina breached an implied warranty of workmanlike service, it would appear that Luckenbach would be precluded from recovery on the basis of such breach by Albina by virtue of Luckenbach's breach, not only of the warranty of seaworthiness, but of its express undertaking with respect to furnishing water on the ship's fire line.

As has been pointed out in the Statement (supra, p. 11), it is clear from the testimony of Sterling, Luckenbach's Marine Superintendent, and from the testimony of the vessel's Chief Engineer, Hebert, and of the First Assistant Engineer, Beutgen, that there was no idea on the part of anyone that Albina was to supply an alternate source of water after the section of fire main was removed. On the contrary, Luckenbach expressly undertook to do so. This express undertaking was made in the presence of Richard Brewer, one of Albina's ship repair Superintendents (R. 489), and under these circum-

stances it is clear that Albina was entitled to rely on such undertaking on the part of Luckenbach. When working aboard a ship, Albina recognized the need for fire protection, and assumed that it was available (R. 497).

Even in the absence of such express undertaking it appears that Albina would be entitled to rely upon Luckenbach's implied warranty that the vessel was seaworthy, except as to the specific defects which Albina's personnel came aboard to remedy.

Mesle v. Kea Steamship Corp. (CA 3, 1958), 260 F. 2d 747, 752, expressly held that the warranty of seaworthiness runs to a shoreside repair worker who goes aboard a vessel for the purpose of remedying a defect other than that which caused his injury. It was there said:

> "* * * Since libelant [a repair yard worker] was not engaged in remedying the very defect which caused his injury, the warranty of seaworthiness of the structure in respects other than that calling for repair continued to run to him. Bruszewski v. Isthmian S.S. Co., supra [163 F. 2d 720], consequently does not control this case."

Pinion v. Mississippi Shipping Co. (D.C. La., 1957), 156 F. Supp. 652, is also illuminating in this regard. In that case, a repairman went aboard a ship to replace a corroded pipe. It was held that there was no warranty of seaworthiness to him as to the pipe, but that there was such a warranty with respect to defective scaffolding which he was required to use in attempting to replace the pipe.

As applied in the instant case, the unseaworthiness which occasioned the damage was not among the defects

which Albina had come aboard to repair. Earlier on the day of the fire, Albina had come aboard to remove and replace a defective section of the fire line. However, it was not the defective condition of the fire main which contributed to the loss; rather, it was the absence of an alternate source of water for the fire main after the section of pipe had been removed. Nor, of course, was the defective ladder in No. 5 hold the cause of the damage.

Thus, it appears that Albina, when it came aboard to repair the ladder, was entitled to rely upon a warranty that the vessel was seaworthy, as to the availability of water on the fire line. Albina should also be entitled to rely upon the vessel's seaworthiness as to competence of the crew with respect to knowledge of the inoperability of the fire line and how it could be remedied.

Appellant is aware that in *Hugev v. Dampskisaktieselskabet International* (D.C. Cal., 1959), 170 F. Supp. 601, aff'd (CA 9, 1960), 274 F. 2d 875, cert. den. 363 U.S. 803, 4 L. Ed. 2d 1147, it was indicated that an implied warranty of seaworthiness does not extend to a stevedoring contractor, as distinguished from the contractor's individual employees. However, a consideration of the rationale of the *Hugev* decision indicates that such denial of the right to rely upon a warranty of seaworthiness is not applicable in the instant case.

In the *Hugev* case, supra, the District Court held and this Court agreed that an expert stevedoring contractor coming aboard a vessel for the purpose of unloading cargo should be aware that the vessel has just completed a long ocean voyage and that there may be a number of "lurking

dangers" aboard the vessel. Here, on the other hand, it appears that the vessel's owner had determined, when she arrived in Portland, that a number of specific repairs were necessary. In effect, the shipowner said to Albina, "We want you to come aboard and repair these particular defects." Under such circumstances, the repair contractor is entitled to rely upon a warranty that the vessel is seaworthy with respect to other conditions. More specifically, the repair contractor is entitled to a vessel free of hazardous conditions created by the owner's neglect after the vessel has reached port.

In any event, in the instant case the question does not depend entirely upon an implied warranty of seaworthiness, inasmuch as Luckenbach expressly undertook to see that water was supplied to the fire line after a section of the main had been removed. Such being the case, it would appear that Luckenbach's contractual breach with respect to the fire line precludes it from recovery on any theory of a breach of implied warranty.

V.

The District Court Erred in Holding that Albina Is Not Entitled to Collect Its Repair Bill.

As has been sufficiently pointed out in preceding portions of this brief, there would have been no physical damage to the vessel whatever, but for the failure of the fire line, and the lack of competence of the ship's crew to remedy that failure of equipment. Since it is Luckenbach, and not Albina, that is chargeable both with the failure of the fire line and with the incompetence of the

crew, it is also Luckenbach and not Albina which should bear the burden of the damage to the vessel. Accordingly, the Court erred in concluding that Albina does not have any right to collect its bill for repairing the fire damage to the ship (Conclusion VI, R. 92).

As was pointed out in the Statement (supra, p. 16), it is admitted that Albina made the repairs at a stated cost of $28,933.89 and that payment has not been made therefor. Luckenbach contended that Albina repaired the fire damage to the ship as a volunteer, and that its conduct in that regard constituted an admission of liability. This was wholly unsubstantiated by the evidence.

The uncontradicted evidence is that the repairs were accomplished on the oral authorization of Luckenbach's Port Engineer, Herbert Sterling, in accordance with the normal course of dealings between Luckenbach and Albina (R. 587-590). Thus, it is established that the repairs were done at Luckenbach's instance and request, and it follows that Albina is entitled to be paid for accomplishing the repairs.

CONCLUSIONS

1. The District Court erred in adopting its Opinion as Findings and Conclusions.

2. The Fire Statute is not applicable, and Luckenbach is liable directly to the libelants.

3. Luckenbach was at fault both with respect to the start and the spread of the fire.

4. In no event can Albina be held liable to libelants

for any damages in excess of the value of the cargo in the forward part of No. 5 hold. All other cargo damage, all damage to the ship, and any consequential damages sustained by Luckenbach were proximately caused by Luckenbach's neglect and the unseaworthy condition of the vessel.

5. Luckenbach's conduct was such as to bar it from any recovery over from Albina of such sums as Luckenbach is required to pay the libelants.

6. No fault of Albina proximately caused any of the damage to the vessel. Luckenbach cannot recover its consequential damages, and Albina is entitled to recover the full amount of its repair bill from Luckenbach.

Respectfully submitted,

KRAUSE, LINDSAY & NAHSTOLL,
GUNTHER F. KRAUSE,
ALAN H. JOHANSEN,
Proctors for Appellant,
Albina Engine & Machine Works, Inc.

APPENDIX

TABLE OF EXHIBITS

[References are to pages of the printed Record.]

Libelants' Exhibits	Exhibit Number	Identified	Offered	Received or Rejected
		[All Exhibits were listed in Pre-trial Order (R. 69, 70), and Parties Stipulated that No further Identification Would be Required (R. 69).]		
	1		101	102
	2		102	468**
	3*		102	103
	4		103	105
	5*		106	108
	6A to 6F		108	109
	7 (A		535	535
	(B		563	566
	26*		109	109
Luckenbach's Exhibits				
	23		112	112
	24*		465	465
	25A & 25B*		465	466
Albina's Exhibits				
	41*		469	469
	42*		469	470
	43*		470	470
	44		470	471
	45		481	482**
	45		593	594

* Transmitted to Clerk of Court of Appeals, but not reproduced in Record.

** Rejected.